85-1697

No.

Supreme Court, U.S.
FILED
APR 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

BILLY JOE DAY - - - - - Petitioner

versus

WILLIAM C. SEABOLD, Warden for
the Commonwealth of Kentucky - - Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND APPENDIX

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April ____, 1986

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

QUESTION PRESENTED FOR REVIEW

Was the Petitioner, who received a life sentence for murder imposed by a jury, denied due process of law and therefore, entitled to habeas corpus relief when in a state prosecution, a private attorney, retained by the family of the deceased was permitted to make the closing argument to the jury, over the Petitioner's objection, wherein he told the jury that "the rule of the gun" existed in the community, that the jury was "the elected protectors of the community and its future" and that it was necessary to give the Petitioner the maximum sentence, life imprisonment, for the maximum offense for which he could be found guilty, murder, in order to correct a belief in the community that you could kill somebody and only get five or ten years?[1]

---

[1]The jury was instructed that they could find the defendant guilty of murder, manslaughter in the first degree or manslaughter in the second degree. Guilt or innocence and the sentence to be imposed were decided by jury in the same proceedings. The trial was not bifurcated.

THE PARTIES TO THE PROCEEDINGS IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED ARE AS FOLLOWS:

Billy Joe Day	Petitioner-Appellant In the United States Court of Appeals for the Sixth Circuit. Represented by Robert E. Fleming, Attorney, 310 Starks Building, Louisville, Kentucky 40202
William C. Seabold, Warden, for the Commonwealth of Kentucky	Respondent-Appellee Represented by Honorable David L. Armstrong, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

BILLY JOE DAY - - - - - *Petitioner*

v.

WILLIAM C. SEABOLD, Warden for the Commonwealth of Kentucky - - *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND APPENDIX

The Opinion delivered in the United States Court of Appeals for the Sixth Circuit was not published.

The grounds on which the jurisdiction of the Court is invoked are as follows:

1. The Judgment sought to be reviewed was entered on January 17, 1986, by the United States Court of Appeals for the Sixth Circuit.

2. The Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

The Constitutional provisions involved are:

The Fourteenth Amendment to the Constitution of the United States of America provides in pertinent part as follows:

> . . . [N]o State shall make or enforce any law which shall abridge the privileges or immunities

of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law. . . .

The Statutes involved are:

Kentucky Revised Statute KRS 507.020

"(1) A person is guilty of murder when:

(a) With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution a person shall not be guilty under this subsection if he acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. However, nothing contained in this section shall constitute a defense to prosecution for or preclude a conviction of manslaughter in the first degree or any other crime; or

(b) Including, but not limited to, the operation of a motor vehicle under circumstances manifesting extreme indifference to human life, he wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person.

(2) Murder is a capital offense."

KRS 507.030

"(1) A person is guilty of manslaughter in the first degree when:

(a) With intent to cause serious physical injury to another person, he causes the death of such person or of a third person; or

(b) With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance as defined in subsection (1)(a) of KRS 507.020.

(2) Manslaughter in the first degree is a Class B felony."

KRS 507.040

"(1) A person is guilty of manslaughter in the second degree when, including, but not limited to, the operation of a motor vehicle, he wantonly causes the death of another person.

(2) Manslaughter in the second degree is a Class C felony."

KRS 532.060

"(1) A sentence of imprisonment for a felony shall be an indeterminate sentence, the maximum of which shall be fixed within the limits provided by subsection (2), and subject to modification by the trial judge pursuant to KRS 532.070.

(2) The authorized maximum terms of imprisonment for felonies are:

(a) For a Class A felony, not less than twenty years nor more than life imprisonment;

(b) For a Class B felony, not less than ten years nor more than twenty years;

(c) For a Class C felony, not less than five years nor more than ten years; and

(d) For a Class D felony, not less than one year nor more than five years.

(3) The actual time of release within the maximum established by subsection (1), or as modified pursuant to KRS 532.070, shall be determined under procedures established elsewhere by law."

STATEMENT OF THE CASE

The Petitioner, Billy Joe Day, was tried by a jury in the Letcher County, Kentucky Circuit Court for the offense of murder as defined by Kentucky Revised Statutes 507.020. In addition to being instructed as to the offense of murder which carries a penalty of twenty years to life, the jury was instructed that they could find the defendant guilty of the lesser included offenses of manslaughter in the first degree (KRS 507.030) which carries a penalty of ten to twenty years or manslaughter in the second degree (KRS 507.040) which carries as a penalty a sentence of from five to ten years. Under Kentucky law the jury determines guilt or innocence and fixes the penalty in the same proceeding. The jury found Day guilty of murder, the maximum offense, and fixed the penalty at life imprisonment, a maximum penalty. Day appealed this conviction to the Supreme Court of Kentucky and his conviction was affirmed.

While serving the sentence imposed, Day filed a pro se Petition for a Writ of Habeas Corpus in the United States District Court for the Eastern District of Kentucky. The District Court reviewed the entire record and entered an Order denying the Petition For A Writ Of Habeas Corpus. Day appealed to the United States Court of Appeals for the Sixth Circuit. On

January 17, 1986 the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court.

Billy Joe Day was charged with murdering Bobby Wayne Benton. On November 5, 1982, Day's wife, Chrissie was living with Benton along with one of their two children when Benton was shot and killed.

Chrissie had left Day in August of 1982 and filed for divorce. Chrissie, their 13-year-old daughter, Viola Miranda, their 18-year-old son, Anthony Day, and Day all testified that Day didn't want the divorce because he still loved Chrissie.

The divorce became final on November 4, 1982. Chrissie and Benton planned to marry on November 6, 1982.

Day was working as a coal miner at the time of his marriage to Chrissie and continued to do so until 1972 when he was forced to quit mining because he had developed "black lung" disease. In addition to having black lung disease at the time of the shooting, Day also was taking medicine "for his nerves" and was suffering from alcoholism.

In 1979 Chrissie and Day separated for one month. The uncontradicted testimony was that the marital difficulties Day and Chrissie experienced were the result of Chrissie's infidelity. On one occasion Day discovered Chrissie having sexual relations with his brother. On another occasion he found her engaged in sexual relations with her then current boyfriend. In August of 1982 she became romantically involved with

Benton and moved out of their home and began living with him.

At the trial of this case, it was proved beyond a reasonable doubt that Day shot Benton. The real issue for the jury to decide was whether Day was guilty of murder (KRS 507.020) or one of the lesser degrees of homicide under Kentucky law, i.e., manslaughter in the first degree (KRS 507.030) or manslaughter in the second degree (KRS 507.040).

Under Kentucky law a person may not be found guilty of murder unless it is established that at the time the accused intentionally caused the death of another he was not acting ". . . under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be."

Day testified in his own behalf. He stated that he had problems seeing his daughter after his wife left him and began living with Benton. The separation from his wife "tore him all to pieces" and when he would see her he would "beg and pray to her to come back to me, but she wouldn't."

Prior to the shooting, according to Day, he received a phone call from someone who identified himself as Benton and who said he was going to "shoot his brains out if he caught me messing around his house." He also stated that he received two phone calls from some lady who said that Benton would kill him.

Day testified that on the night of November 4th, the day before the shooting, he was driving down the road when a truck, owned by he and his wife, which his wife took when she left him, ran into him and forced him off the road. He followed the truck to Benton's place where it pulled into Benton's driveway. Day didn't know what Benton looked like but he knew where he lived as a result of visiting with his daughter.

On Friday, November 5, 1982, Day went to Benton's to pick up his daughter around 6:30 P.M. Day and his daughter went to a restaurant for dinner where they talked about the separation. Day asked his daughter to talk to her mother and try to persuade her to come back to him. He told his daughter to tell her mother that he "still loved her and always would." During this conversation, his daughter told him the divorce had just become final and that her mother and Benton were going to get married the next day.

Day admitted to have a drinking problem and stated that for the past five years he had drank about a "gallon" a day. On the day of the shooting he stated that he consumed a "fifth of liquor and some beer." His daughter testified that at the time of their conversation in the restaurant, "he was pretty full." Day testified he had something to drink before he met his daughter but that he drank "most of it after he took her back which was around 9 or after."

Day stated that after he dropped his daughter off at Benton's, he went home and loaded his car with his deer hunting clothes and camping stuff, intending to go to the home of a friend of his with whom he often

hunted deer. As he was leaving his home, he met his son who helped him get his car out of a ditch. His son testified that he helped Day out of the ditch and that at the time, he appeared to be real upset and "wild eyed drunk."

When Day arrived at his friend's home, his friend wasn't in. He then decided to go to his brother's and spend the night rather than return to his home. On the way to his brother's, he was "thinking" about Benton having said he was going to shoot him so he decided he would see what Benton looked like. He knew it was about time for Benton to come in from work (he worked the 2:00 P.M. to 10:00 P.M. shift in a coal mine). He pulled off the side of the road near Benton's and stood by a pine tree that overlooked Benton's driveway. From his vantage point he saw Benton drive up and his wife came out wearing a "negligee or whatever you want to call it."

Day stated that he didn't remember shooting Benton at this time or talking to his wife or daughter. His first recollection of anything after seeing his wife greet Benton in her negligee was being arrested at his brother's house at approximately 1:30 A.M.-2:00 A.M.

Chrissie, Day's wife, testified that on the day of the shooting, Day came by Benton's around 7:00 P.M. and picked up his daughter. The daughter returned around 9:00 P.M. and was crying. She said her daughter was crying because Day had stated that her mother and Benton "would never get married tomorrow." Chrissie testified that she was taking a bath when her daughter came in and after talking to her daughter she got fully

dressed. After she got dressed, Chrissie and her daughter remained in the house until she saw her truck, which Benton was driving, come down the driveway. Upon seeing the truck, Chrissie went to the garage and raised the garage door. Benton parked the truck outside of the garage and she went to help him carry some things from the truck. As they were returning from the truck, she heard a shot and turned to Benton, who was behind her, and asked if he was hurt and he replied that he was. At this time she heard Day holler for her to get out of the way or he would shoot her.

After Benton was shot, the sheriff directed two of his deputies to pick up Day. The deputies located Day at his brother's house and found Day passed out in a chair drunk. Day had beer in all his pockets.

Day was taken into custody and he was cited for Driving Under the Influence of Alcohol and a breathalyzer test was administered. Day's blood alcohol content at 2:20 A.M., the time of the test, was .17. Under Kentucky law, a person is presumed to be under the influence of alcohol if their blood alcohol reading is over .10.

Day's brother, Ralph, testified that Day came to his house around twenty minutes to 11:00 P.M. on the night of the shooting and that Day laid down in the chair and went to sleep and that Day was sleeping in the chair when the police came.

Dr. Phillip W. Johnson, a psychologist, was called as a witness for Day. Dr. Johnson was employed as a forensic psychologist by the Kentucky Correctional Psychiatric Center where he served as chief psycholo-

gist of the facility. Dr. Johnson had examined Day at the request of the Trial Judge. He was requested to examine Day to determine whether "he was experiencing any severe psychological difficulties at the time of the alleged crime."

Day was examined at Dr. Johnson's facility over a period of 18 days. In addition to being given a psychological exam while at Dr. Johnson's facility, Day was treated for alcoholism. Day's intellectual functioning improved approximately 30 percent while at the facility. Dr. Johnson testified that in examining Day, he was acting on behalf of the Court and he, in his words, "was going to remain very neutral." In carrying out his examination of Day, Dr. Johnson reviewed his medical records along with the medical chief of staff.

In the course of his examination, Dr. Johnson determined that Day "had two areas in his life that were of value to him. One was his job and the second was his marriage." Day had worked consistently from a time prior to his marriage at the age of 18 until 1972. According to Dr. Johnson, when Day could no longer work due to his black lung condition, a very important part of his life was taken away from him. As a result, Day placed even greater value on his marriage. After he could no longer work, his drinking increased dramatically. Dr. Johnson attributed this to Day's loss of his job and "understandable loss of his self-esteem as a man, as a human being, as a provider for his family."

According to Dr. Johnson, the last separation had a "devastating effect" on Day.

When Dr. Johnson was asked if, as a result of his examination and the circumstances surrounding the shooting, he had an opinion as to Day's state of mind and behavior at the time of the shooting, he responded:

> Well, yes, I do. I think .... In my opinion, I think Mr. Day saw his worst dream or worst nightmare become reality, that his wife had separated from him, had divorced him, had begun to live with another man, and to his knowledge, they planned on marrying the next day, and I think he saw much of his life in an emotional sense, about to come to an end.

When Dr. Johnson was asked, "would you say he was under extreme emotional distress at the time of the shooting?" Dr. Johnson responded, "Yes, I think there is very little doubt that he was under a tremendous amount of psychological stress."

The prosecutor's case against Day was conducted primarily by James W. Craft, a private attorney retained by Benton's family. Counsel for Day objected in a written and oral motion before trial to the prosecution being conducted by private counsel retained by the family of the deceased. The motion was overruled.

In the course of the trial, Mr. Craft made the opening and closing statement and examined most of the critical witnesses. During the course of his closing argument, Mr. Craft made the following argument which was objected to by counsel for Day:

> "I do want to thank you, of course, for your attentiveness in this case, for your attendance at this trial, and also I would like to say to you that I

don't envy you the job that you have got to do. But ladies and gentlemen, I want to say something to you, and I mean it sincerely. It's a job that this county has to have done. It's time that the rule of the gun was stopped in this county. And I told you at the outset of this trial that the Commonwealth was going to bring you evidence that would justify putting Billy Joe Day in the penitentiary for life. There are 30,000 citizens in this county. Out of those 30,000 you twelve people have been chosen to do that. You twelve people have become the elected protectors of this county and its future.

By Mr. Tustaniwsky: Your Honor, I object. The Jury is supposed to try the case on the merits.

By Mr. Craft: It's the same kind of an argument he gave.

By the Court: Overruled.

. . . .

This is your county. If you people want to let senseless killings like this occur in your county and a man walk away from a killing of this nature, then that's the thing for you to do. . . . if you want to do that and if you all want to walk down the streets or go to your homes wondering who is behind that tree, then you let Billy Joe Day off in this case with a light sentence. You needn't to doubt but what the verdict in this case will be received by the hoodlums of this county. . . .

By Mr. Tustaniwsky: Your Honor, I object.

By the Court: Overruled.

By Mr. Craft, Continuing: . . . with the greatest of interest. I have heard it said you can kill somebody in Letcher County and it's only ten years, it's only five years, and maybe that's been

> the case, but you people have the evidence on which to make that change."

Counsel's objections as set out above were overruled. The jury was never given any admonition whatsoever regarding Mr. Craft's argument.

The Petition for a Writ of Habeas Corpus and the Appeal to the Supreme Court of Kentucky alleged the following three grounds for the relief sought:

I. There was insufficient evidence to support a murder conviction.

II. The defendant was denied a fair trial and due process of law because a private attorney retained by the family of the deceased conducted the prosecution of the case.

III. The private prosecutor's improper and inflammatory comments in his closing argument denied the defendant due process of law and a fair trial.

ARGUMENT

In *Donnelly* v. *Christoforo,* 416 U. S. 637, 40 L. Ed. 2d 431, 94 S. Ct. 1868 (1974), this Court reviewed the question of whether a particular closing argument by a prosecutor denied the defendant due process of law. In holding that it did not, the opinion of the Court contained the following statement at page 645:

> "Similarly, the prosecutor's remarks here, admittedly an ambiguous one, was but one moment in an extended trial and was followed by specific disapproving instructions. Although the process of constitutional line drawing in this regard is neces-

> sarily imprecise, we simply do not believe that this incident made respondent's trial so fundamentally unfair as to deny him due process."

Unlike the remarks of the state prosecutor in *Donnelly* v. *De Christoforo,* supra, the argument of the privately retained prosecutor was not ambiguous and it was "so fundamentally unfair as to deny him due process."

The improper argument of the privately retained prosecutor was intentional. It was calculated to overcome an abundance of evidence that at the time of the shooting, Day was under the influence of an extreme emotional disturbance and therefore should not be found guilty of murder. (Murder was the only offense for which he could receive a penalty in excess of twenty years.)

The privately retained prosecutor carefully laid out the erroneous premise that the jurors had been "elected protectors of the community." He then went on to state that a lawless situation existed in the community which he described as "rule of the gun." There was no evidence that such a situation existed. To this he added, he "had heard it said that you could shoot somebody in Letcher County and it's only ten years, it's only five years . . ." (There was no evidence that such a belief existed.)

He then concluded by saying that the jury, whom he had designated "the elected protectors of the community," could put an end to this lawless situation in the community by imposing the maximum penalty for the maximum offense.

Unfortunately for Day, the jury verdict obtained as the result of the intentionally prejudicial argument by the hired prosecutor, was the exact verdict he was hired to obtain, guilty of the maximum offense—murder with imposition of the maximum penalty—life imprisonment.

Unlike the improper argument in *Donnelly* v. *De Christoforo, supra,* the argument of the hired prosecutor was made over the defendant's objection and without any admonition by the Court.

The facts of this case clearly point out how a denial of due process is likely to result when the family of the deceased in a murder trial is permitted to hire an attorney to conduct the prosecution of the accused.

The only issue involved in the trial of Day was the degree of homicide he committed. The private attorney retained by the family of the deceased had one goal and that was to get the maximum penalty, i.e., life, for the highest degree of homicide, i.e., murder. To this end, he was permitted to conduct the examination and cross-examination of all of the critical witnesses and was permitted to make the opening and closing arguments. The duly elected prosecutor played a very insignificant role. Not only did the public prosecutor pay an insignificant role in the trial of the case, he ignored the results of the examination of the State's Chief Forensic Psychologist, who was appointed by the Court and permitted private counsel to seek and obtain a murder conviction after receiving the results of the examination which concluded that Day was under an extreme emotional influence at the time of the shooting and

therefore, under Kentucky law, could not be guilty of murder.

The duty of a public prosecutor is clearly stated in *Berger* v. *United States,* 295 U. S. 78, 79 L. Ed. 1321, 55 S. Ct. 629 (1934), where the Court stated that the public prosecutor is:

> [T]he representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.
>
> It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. *Id.* at 88.

The duty of privately retained counsel on the other hand is to represent the interest of his client alone (Canon 5 of the American Bar Association Code of Professional Responsibility).

The obvious conflict between the role of privately retained counsel and that of a public prosecutor and the result of such conflict, is well stated in the following excerpt:

> Conversely, a private retained attorney owes his client individual allegiance, and once employed he

> must not act for an interest even slightly adverse to that of his client in the same general matter. Therefore, in view of the ethical and judicial restrictions imposed on the public prosecutor and the generally recognized loyalties of the private advocate, "private prosecutor" is a contradiction in terms. The high standard of impartiality required of a prosecutor realistically cannot be expected of the private advocate. *Private Prosecution — the Entrenched Anomaly,* 50 N. Car. L. Rev. 1171, 1173 (1972).

Many states have prohibited the participation of private prosecutors in criminal trials. See, e.g., *Commonwealth* v. *Gilbs,* 79 Mass. (4 Gray) 146 (1855); *Meister* v. *People,* 31 Mich. 99 (1875); *Biemel* v. *State,* 71 Wis. 444, 37 N.W. 244, 245-48 (1888); *McKay* v. *State,* 90 Neb. 63, 132 N.W. 741, 745 (1911); *State* v. *Jensen,* 178 Iowa 1098, 160 N.W. 832 (1917).

The reasoning for disallowing the participation of private prosecutors in Missouri is set out in the following quotation from *State* v. *Harrington,* 534 S.W. 2d 44, 50 (Mo. 1976):

> The modern day prosecutor wields the power of the State's investigatory force, decides whom to indict and prosecute, decides what evidence to submit to the Court, negotiates the State's position in plea bargaining and recommends punishment to the court. The entry of a private prosecutor into a criminal prosecution exposes all of these areas to prejudicial influence, we consider such exposure intolerable.

In view of the inherent conflict which exists when privately retained counsel is permitted to assume the role of the state prosecutor and the propensity of such a situation to result in a denial of due process, the Petitioner urges this Court to consider whether or not such an arrangement in and of itself constitutes a denial of due process.

CONCLUSION

The improper argument made by privately retained counsel over Petitioner's objection was such that it made Petitioner's trial so fundamentally unfair as to deny him due process.

For the reasons hereinabove stated, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ROBERT E. FLEMING, Attorney
310 Starks Building
Louisville, Kentucky 40202
(502) 587-6554

Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 1986, copies of the foregoing Petition were mailed to Honorable David L. Armstrong, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, Counsel for Respondent.

ROBERT E. FLEMING, Attorney
Counsel for Petitioner, Day

APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 85-5537

BILLY JOE DAY - - - - *Petitioner-Appellant,*

v.

WILLIAM C. SEABOLD, Warden - *Respondent-Appellee.*

On Appeal from the United States District Court for the Eastern District of Kentucky.

JUDGMENT—Filed January 17, 1986

Before: ENGEL and MILBURN, Circuit Judges; and WOODS, District Judge.*

PER CURIAM. Billy Joe Day appeals the order entered in the United States District Court for the Eastern District of Kentucky denying his petition for habeas corpus brought pursuant to 28 U.S.C. § 2254. Mr. Day was convicted of murder under Ky. Rev. Stat. § 507.020 and sentenced to life imprisonment. His conviction was upheld by the Kentucky Supreme Court. On March 5, 1985, Mr. Day filed a petition for writ of habeas corpus. A Magistrate's Report and Recommendation was filed on May 3, 1985 recommending that the petition be denied. On May 24, 1985, Judge G. Wix Unthank adopted the Magistrate's recommendation and denied the petition.

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*The Honorable George E. Woods, United States District Court for the Eastern District of Michigan, sitting by designation.

Mr. Day was convicted for the murder of his ex-wife's finance on November 5, 1982. He argues that the district court erred in denying his petition on three bases.

Day's first argument is that the district court erroneously rejected his claim that there was insufficient evidence to support a jury conviction for murder under Ky. Rev. Stat. § 507.030. There is no dispute that Day is culpable for the killing of Bobby Wayne Benton. Day argues that under section 507.030, the prosecution failed to show that he was not acting "under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse," which he contends is an element of the murder offense.

He also alleges that he was denied a fair trial and due process as a result of the trial court allowing privately retained counsel to actively conduct his prosecution. While noting that this court has approved of this procedure in Kentucky, *see Stumbo* v. *Seabold*, 704 F. 2d 910 (6th Cir. 1983), Day urges the court to modify its position regarding prosecution by private attorneys.

Finally, Mr. Day alleges that he was denied a fair trial due to impermissibly inflammatory statements made by the prosecuting attorney during his closing remarks.

Upon a review of the record, we agree with the district court that Day's argument that the evidence was insufficient to support a jury conviction for murder is not meritorious. The evidence on the issue of extreme emotional disturbance, while supported by the testimony of an expert, was countered in turn by evidence of Day's predisposition to commit the crime as is evidenced by a conversation with his daughter earlier the same day. Likewise, while it is plain Day had been intoxicated, we are unable to hold that as a matter of law a jury could not have rationally found that at the time of the actual shooting he was so inebriated that he lacked any conscious reason to cause death. The

petitioner's complaint that his rights to due process were deprived when privately retained counsel conducted his prosecution must likewise fail. This is particularly true where there was present at all times during the trial a regularly qualified state prosecutor. Such procedure has been approved in this circuit in *Stumbo, supra,* and while Day's counsel has urged us to modify that view, we note that it has again been considered and upheld where control was retained by the public prosecutor over the conduct of the trial. *See Polo Fashions, Inc.* v. *Stock Buyers International, Inc.*, 760 F. 2d 698, 704 (6th Cir. 1985).

Finally, while we are unable to approve of some of the closing argument of counsel for the State, we agree with the magistrate that the statements objected to were not so egregious in content nor extensive in use as to substantially impair the petitioner's right to a constitutionally fair trial. *Webster* v. *Rees*, 729 F. 2d 1098 (6th Cir. 1984). We find no merit in any of the other allegations advanced by petitioner.

Accordingly, the judgment of the district court is AFFIRMED.

ISSUED AS MANDATE: 2/10/86

COST: none

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

Civil Action No. 85-128

BILLY JOE DAY - - - - - - - *Plaintiff,*

v.

WILLIAM SEABOLD, Warden,
Luther Luckett Correctional Complex - *Defendant.*

ORDER—Filed May 24, 1985

The Magistrate, having filed his Report and Recommendations on May 3, 1978, the plaintiff having filed objections thereto on May 16, 1985, and the Court having reviewed the entire record and being advised,

IT IS ORDERED AND ADJUDGED:

1. That the plaintiff's objections to the Magistrate's Report and Recommendations are overruled.

2. That the Magistrate's Report and Recommendations are AFFIRMED and ADOPTED as the findings and conclusions of the Court.

3. That the plaintiff's petition for a writ of habeas corpus is DENIED.

4. That this action is STRICKEN from the docket.

This the 24th day of May, 1985.

(s) G. Wix Unthank
G. Wix Unthank, Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

Civil Action No. 85-128

BILLY JOE DAY - - - - - - - *Petitioner,*

v.

WILLIAM SEABOLD, Warden,
Luther Luckett Correctional Complex - *Respondent.*

MAGISTRATE'S REPORT AND RECOMMENDATION

—Filed May 3, 1985

Billy Joe Day was convicted in the Letcher Circuit Court for the murder of Bobby Wayne Benton. Now serving a sentence of life imprisonment, he has petitioned this court for a writ of habeas corpus pursuant to 28 U.S.C. Section 2254. Currently before the court on respondent's motion to dismiss or, in the alternative, for summary judgment, it has been referred to the undersigned for a report and recommendation. 28 U.S.C. Section 636(b)(1)(B).

Day presents three arguments, each of which was considered and rejected by the Kentucky Supreme Court. First, he argues that the trial court erred in failing to direct a verdict of acquittal on the murder charge because the prosecution did not introduce evidence negating his proof that he was acting under an extreme emotional disturbance. I disagree.

Day's proof of extreme emotional disturbance consisted primarily of his testimony and that of Dr. Phillip Johnson. According to Day, he was hiding outside the house occupied by his ex-wife and Benton on November, 1982, supposedly

to ascertain what Benton looked like. When his ex-wife exited the house to greet Benton while wearing a negligee, Day blanked out — he remembers nothing which transpired thereafter.

Dr. Robinson, a psychologist, testified that Day responded to stress in a "more maladaptive nonconstructive way than most other people would." Further, Dr. Johnson stated that, when he had been drinking, Day feels shamed due to the sexual activities of those close to him and would become aggressive and harmful to others. In Dr. Johnson's view, when Day saw his wife appear and greeet the victim while dressed in a negligee, he suffered an extreme emotional disturbance.

On the other hand, there was a plethora of evidence that Day's ex-wife was not wearing a negligee at the time of the incident; instead, she was wearing jeans and a sweater. Also, there was evidence that Day was hiding behind a tree, armed with a shotgun, when the deceased returned home from work. Additionally, there was testimony that Day had been seen in the vicinity several days prior to the shooting. Finally, in perhaps the most damning testimony of all, Day's daughter recounted his statement, made earlier in the evening of November 5th, that his ex-wife and the victim would not be married the next day as planned.

Under Kentucky law, proof of extreme emotional disturbance does not place a burden on the Commonwealth to come forth with negating evidence. *Hayes* v. *Commonwealth*, Ky., 625 S. W. 2d 583, 585-86 (1981); *Gall* v. *Commonwealth*, Ky., 607 S. W. 2d 97, 109 (1980). Rather, the defendant is only entitled to an instruction on the issue; weighing the persuasiveness of the proof is a task left to the jury. The Constitution does not require a different rule. *See Thomas* v. *Arn*, 704 F. 2d 865, 869-878 (6th Cir. 1983).

Day next argues that the trial court erred in allowing privately retained counsel to assist in the prosecution of the case. Absent some evidence that the private prosecutor ignored the interests of justice in favor of seeking a conviction, his assistance of the public prosecutor is not a *per se* constitutional violation. *Stumbo* v. *Seabold,* 704 F. 2d 910, 911 (6th Cir. 1983).

Day's remaining argument is that the retained prosecutor engaged in such gross misconduct that he was denied a fair trial. On habeas corpus review, the standard to be applied to measure allegations of prosecutorial misconduct is whether the petitioner was denied a fundamentally fair trial. *Cook* v. *Bordenkircher,* 602 F. 2d 117 (6th Cir.), *cert. denied,* 444 U. S. 936 (1979).

In this case, the putative misconduct of the private prosecutor consisted of statements he made to the jury during his closing argument. The prosecutor argued:

> It's time that the rule of the gun has stopped in this county. And I told you at the outset of this trial that the Commonwealth was going to bring you evidence that would justify putting Billy Joe Day in the penitentiary for life. There are 30,000 citizens in this county. Out of those 30,000 you twelve people have been chosen to do that. You twelve people have become the elected prosecutors of this county and its future.

He later stated:

> This is your county. If you people want to let sensless (sic) killings like this occur in your county and a man walk away from a killing of this nature, then that's the thing for you to do.
>
> [I]f you want to do that and if you all want to walk down the streets or go to your homes wondering who is behind that tree then you let Billy Joe Day off in this

case with a light sentence. You needn't to doubt but what the verdict in this case will be received by the hoodlums of this county. . . .

Mr. Tustaniwsky: Your Honor, I object.

By the Court: Overruled.

By Mr. Craft, Continuing: . . . with the greatest of interest, I have heard it said you can kill somebody in Letcher County and it's only ten years, it's only five years, and maby (sic) that's been the case, but you people have the opportunity to change it and you have the evidence on which to make that change.

The Kentucky Supreme Court found the remarks of the retained prosecutor in closing argument were "within the bounds of propriety," citing *Wallen* v. *Commonwealth,* Ky., 657 S.W. 2d 232 (1983). I concur, regardless of whether the prosecutor's statements are measured under Kentucky law as exemplified by *Wallen* and *Wilson* v. *Commonwealth,* Ky., 411 S.W. 2d 33 (1967), or under federal precedent as *Collins* v. *Francis,* 728 F. 2d 1322, 1339-1340 (11th Cir. 1984), or *United States* v. *Alloway,* 397 F. 2d 105, 113 (6th Cir. 1968). The arguments were not egregrious; Day was not denied a fair trial due to the arguments of the prosecutor. *Webster* v. *Rees,* 729 F. 2d 1078, 1079-1081 (6th Cir. 1984).

Accordingly, it is concluded that none of Day's arguments warrant habeas corpus relief. It is therefore recommended that his petition for such relief be denied.

Objections to this Report and Recommendation must be filed within ten (10) days of the date of service of the same or further appeal is waived. *Thomas* v. *Arn,* 728 F. 2d 813 (6th Cir. 1984); Rule 72(b), Fed. R. Civ. P.

This the 3rd day of May, 1985.

(s) Joseph M. Hood
United States Magistrate